

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLIOTT REIHNER SIEDZIKOWSKI	:	
& EGAN, P.C.,	:	CIVIL ACTION
Plaintiff,	:	
Third-party Plaintiff,	:	
Counterclaim Plaintiff,	:	
	:	
v.	:	
	:	
DAVID RICHTER, IRVIN RICHTER,	:	
AND HILL INTERNATIONAL, INC.,	:	NO. 96-3860
Defendants,	:	
Counterclaim Defendants,	:	
	:	
JANICE RICHTER, AND	:	
JAN RICHTER P.C.,	:	
Counterclaim Defendants,	:	
	:	
FIRST UNION BANK, formerly FIRST	:	
FIDELITY BANK, UNITED JERSEY BANK,	:	
formerly UNITED JERSEY BANK SOUTH,	:	
HELLRING LINDEMAN GOLDSTEIN &	:	
SIEGAL,	:	
Third-party Defendants.	:	
	:	

MEMORANDUM

R.F. KELLY, J.

AUGUST 21, 1998

Elliott Reihner Siedzikowski & Egan, P.C. ("ERS&E") originally brought this action against Hill International, Inc. ("Hill"), David Richter, and Irvin Richter (collectively "Defendants") to recover \$59,622.43 in legal fees. A bench trial concluded on August 5, 1997. On January 29, 1998, Hill's counterclaims for fraud, negligence, and breach of contract were reinstated and the parties were directed to conduct discovery.

ERS&E answered Hill's counterclaims, brought three counterclaims in reply against Defendants, Janice Richter, and

Jan Richter P.C., and filed a third-party complaint against First Union Bank ("FUB"), formerly First Fidelity Bank, United Jersey Bank ("UJB"), formerly United Jersey Bank South, and Hellring Lindeman Goldstein & Siegal ("the Hellring firm"). Presently before the Court are Defendants' Motion to Dismiss/Strike Plaintiff's Counterclaims and Third-Party Defendants' Motions to Dismiss the Third-Party Complaint. For the reasons that follow, both Motions are granted.

#### **I. FACTS.**

On November 22, 1995, ERS&E was hired to represent Hill, David and Irvin Richter in an action instituted in New Jersey by First Fidelity Bank and New Jersey Bank South ("the New Jersey Action"). Mr. John M. Elliot, Esquire, an attorney with ERS&E, was first contacted in his Pennsylvania office to represent Hill, David and Irvin Richter. Mr. Elliot agreed to represent Defendants. Mr. Elliot first met with Defendants at their office located in New Jersey. A retainer agreement was executed and a check for \$50,000 was tendered to Mr. Elliot on behalf of ERS&E by Irvin Richter on behalf of Hill at that meeting. ERS&E immediately began to work on their representation of Defendants.

In the New Jersey Action the banks accused Hill of defaulting on certain loan agreements by selling contracts and assets of Hill which secured the loans without the consent of the

Banks. Defendants considered the New Jersey Action "life threatening" to both Hill and the Richter family because Irvin Richter was personally liable for a guarantee of \$7.1 million.

The same day Plaintiff's retainer agreement was executed, the Banks applied for emergency relief in New Jersey Superior Court. The relief sought was a temporary restraining order ("TRO") preventing Hill from disbursing the proceeds from the sale of collateral. A hearing was held and Irvin and David Richter, rather than ERS&E, appeared on Hill's behalf. A TRO was entered and the matter was relisted for a continuation hearing the following week.

On November 30, 1995, the hearing continued, however, both Plaintiff and the Hellring firm were representing Defendants at this time. After the hearing, the Honorable John A Sweeney ruled that Hill was in default on its loans and allowed the Banks to seize Hill's accounts receivables. This result was harmful to Hill because it severely restricted the cash available to the company. Defendants intended to appeal the matter immediately.

On December 5, 1995, Judge Sweeney received a phone call from Thomas P. Foy ("Foy"), a prominent New Jersey politician. Foy asked if Judge Sweeney had shut down Hill, indicating that he had received several phone calls from employees of Hill who were concerned about their jobs. Foy then mentioned that a motion for reconsideration might be filed by

Hill. This concerned Judge Sweeney because mere employees of Hill would not be privy to its legal strategies. On December 8, 1995, as a result of Foy's phone call, Judge Sweeney recused himself from the case.

After Judge Sweeney's recusal, the Honorable Harold B. Wells was assigned to the case. A hearing was held on December 11, 1995, and Defendants were represented by both ERS&E and the Hellring firms. At the hearing, Judge Wells reversed Judge Sweeney's finding of default due to the existence of factual issues, however, the Banks were allowed to continue collecting Hill's accounts receivables.

On January 31, Defendants decided to consolidate their representation in New Jersey and orally informed Mr. Elliot that ERS&E's services were no longer necessary. Defendants faxed a letter to ERS&E which confirmed this conversation and thanked the firm for its "invaluable assistance." From this point forward Defendants were represented in the New Jersey action by the Hellring firm.

ERS&E billed Defendants \$59,662.43 for their services but were never paid. On May 21, 1996, Plaintiffs filed the complaint in this action alleging breach of contract, quantum meruit, promissory estoppel, unjust enrichment, and account stated. Defendants, represented by Fellheimer Braverman & Kaskey and Janice Richter of Jan Richter P.C., answered the complaint

and asserted counterclaims for fraud, negligence, and breach of contract.<sup>1</sup> By Order dated November 12, 1996, Defendants counterclaims were dismissed without opinion. A bench trial was held in August of 1997.

On January 29, 1998, Defendant's counterclaims were reinstated and the parties were directed to conduct discovery. As previously stated, ERS&E has answered Defendants counterclaims, brought three counterclaims in reply and filed a third-party complaint in which they demand a jury trial. Hill, Irvin, David, and Janice Richter, and Jan Richter P.C. have moved to dismiss Plaintiffs counterclaims in reply. FUB, UJB, and the Hellring firm have moved to dismiss the third-party complaint.

## **II. CHOICE OF LAW.**

A federal court sitting in diversity applies the choice-of-law rules of its forum state. Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941); LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996). Pennsylvania has developed a choice-of-law approach that combines the contacts analysis of the Restatement Second with the governmental interest analysis. Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 (3d Cir. 1991)(describing Griffith v. United Air Lines, Inc., 203 A.2d 796 (Pa. 1964)). Pennsylvania's approach to choice of law consists of

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<sup>1</sup> Janice Richter is now employed by Fellheimer Braverman & Kaskey.

two parts. LeJeune, 85 F.3d at 1071. First, the interests of the competing states must be compared to determine whether the conflict between them is "true" or "false." Id. Second, if the conflict is "true," the interests of the both states must be compared and the law of the state with more significant interest applied. Id.

A false conflict arises when only one jurisdiction has an interest which would be impaired by the application of another states laws and results in the application of the law of the impaired state. LeJeune, 85 F.3d at 1069; Austin v. Dionne, 909 F. Supp. 271, 274 (E.D. Pa. 1995). A true conflict arises when both states have interests which would be impaired by applying the law of the other state. Austin, 909 F. Supp. at 274. With a true conflict, the state with greater interests prevails. Id.

The conflict presented is a "true conflict." Both New Jersey and Pennsylvania have an interest in the application of its law to the facts presented. The parties are citizens of both states and each state has a governmental interest in protecting its citizens. Unisys Finance Corp. v. U.S. Vision, Inc., 630 A.2d 55, 57 (Pa. Super. 1993)(holding that because one party was a resident of Pennsylvania that state had a sufficient interest in protecting its citizen to create "true conflict"), appeal denied, 645 A.2d 1318 (Pa. 1994).

Comparison of the interests and contacts of both states

reveals that New Jersey law should apply to this matter.

Defendant is a citizen of New Jersey, the initial meeting between the parties occurred in New Jersey, the retainer agreement was executed and paid in New Jersey, the underlying action arose in New Jersey, and all court proceedings took place in New Jersey. Although Plaintiff is a resident of Pennsylvania and did much of its work from its Pennsylvania office, the contacts with New Jersey are much more significant and weigh in favor of the application of New Jersey law to this matter.

### **III. STANDARD.**

A Motion to Dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Under Rule 12(b)(6), the Court must determine whether the allegations contained in the complaint, construed in the light most favorable to Plaintiff, show a set of circumstances which, if true, would entitle Plaintiff to the relief requested. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997)(citing Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)). Dismissal is appropriate only when it clearly appears that the Plaintiff has alleged no set of facts which, if proven, would entitle him to relief. Conley, 355 U.S. at 45-46; Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990).

### **IV. DISCUSSION.**

#### **A. The Motion to Dismiss/Strike Plaintiff's Counterclaims**

in Reply.

ERS&E asserts three counterclaims in reply to Defendants' counterclaims. ERS&E seeks contribution and indemnification from Defendants, Janice Richter, and Jan Richter P.C. ERS&E asserts its abuse of process claim against Hill, Janice Richter and Jan Richter P.C. Defendants, Janice Richter, and Jan Richter P.C. argue that ERS&E's counterclaims must be dismissed, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted. ERS&E argues that its counterclaims are viable. Each counterclaim is discussed below.

**1. Contribution.**

ERS&E asserts a counterclaim in reply for contribution in response to Defendants counterclaim for fraudulent inducement. In their counterclaim for fraudulent inducement, Defendants assert that in executing the retainer agreement they relied on Mr. Elliot's representation that he was a member of the New Jersey Bar and would personally handle court appearances in the New Jersey Action on Defendant's behalf. Defendants claim that Mr. Elliot's failure to personally represent them resulted in Judge Sweeney's original order finding Hill in default and as a result Hill suffered "negative publicity and loss of clients." (Counterclaim of Hill at ¶ 11.) In response, ERS&E claims that any injury in the form of negative publicity or loss of clientele Hill suffered, was in part caused by Foy's ex parte communication



with Judge Sweeney, which was "orchestrated by Foy, Hill and the Richters" and entitles ERS&E to contribution. (Pl.'s Resp. to Defs.' Mot. to Dismiss/Strike Pl.'s Countercls.)

ERS&E's right to contribution arises from New Jersey's "Joint Tortfeasors Contribution Law." N.J. STAT. ANN. 2A:53A-1 et seq. The statute allows "joint tortfeasors," defined as "two or more persons jointly or severally liable in tort for the same injury to person or property," to recover from each other, any monetary sum paid in excess of their fair share of the damages. Id. The Comparative Negligence Act, modified the Joint Contribution Among Tortfeasors Act to the extent that both now require the trier of fact to apportion damages based on the percentage of negligence, rather than on a pro rata basis. Archell v. Ashland Chem. Co., 378 A.2d 53 (N.J. Super. 1977); N.J. STAT. ANN. 2A:15-5.1.

Plaintiffs claim for contribution must fail because a joint tortfeasor cannot, by definition, also be the injured party. Contribution requires two or more parties who are responsible for an injury to a third party. Lenz v. Mason, 961 F. Supp. 709, 719 (D.N.J. 1997)(holding that the Joint Tortfeasor Contribution Act "creates no rights in a plaintiff"). Defendants cannot be joint tortfeasors against themselves. To allow a claim such as this would blur the distinction between contribution and comparative negligence.

ERS&E has asserted the defense of contributory negligence in response to Defendants counterclaims.<sup>2</sup> Defendants can not be tortfeasors against themselves, but they may have contributed to their own damages. ERS&E's contributory negligence defense will have the same practical effect as their claim for contribution would if it were viable. If ERS&E is found liable, any damages owed will be reduced by Defendants' own percentage of negligence.

ERS&E's contribution counterclaim in reply is asserted against Defendants as well as Janice Richter and Jan Richter P.C. Janice Richter and Jan Richter P.C. stand in a different position than Hill, David and Irvin Richter. Any negligence on the part of Janice Richter and/or Jan Richter P.C. will not be taken into consideration at trial as a result of ERS&E's comparative negligence defense and any damages ERS&E owes to Defendant will not be reduced in proportion to Janice Richter and/or Jan Richter P.C.'s negligence.

ERS&E's claims that Janice Richter and her firm provided Hill with legal advice in the New Jersey Action and were involved with Foy's ex parte communication with Judge Sweeney.

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<sup>2</sup> Plaintiffs label their defense as "contributory negligence." Since New Jersey has replaced contributory negligence with comparative negligence, Plaintiff's defense will be considered as comparative negligence. Campione v. Soden, 695 A.2d 1364, 1369-70 (1997)(citing Ostrowski v. Azzara, 545 A.2d 148 (1988)).

This, ERS&E alleges, caused any damage Hill suffered and entitles them to contribution from Janice Richter and Jan Richter P.C.

Janice Richter and Jan Richter P.C. argue that they are not parties to this action and were not properly joined pursuant to Federal Rule of Civil Procedure 14 because they were not served with a summons and a third-party complaint. ERS&E attempts to bring a "counterclaim" against Janice Richter and Jan Richter P.C. Therefore, Federal Rule 14, which deals with third-party practice is inapplicable. FED. R. CIV. PRO. 14. Rule 13 of the Federal Rules of Civil Procedure is applicable. FED. R. CIV. PRO. 13. Specifically, Rule 13(h), on which ERS&E relies, provides that "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provision of Rules 19 and 20." FED. R. CIV. PRO. 13(h). ERS&E contends that Janice Richter and Jan Richter P.C. were properly joined in this action pursuant to Federal Rule 13(h).

ERS&E's counterclaim must be dismissed because, under Rule 13(h), a counterclaim "may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party." WRIGHT, MILLER, & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1435. Because ERS&E's counterclaim in reply against Defendants must be dismissed, their counterclaim against Janice Richter and Jan Richter P.C. must

also fail. To hold otherwise would allow ERS&E to bring a counterclaim "solely against persons who are not already parties" merely by asserting that counterclaim against the original Defendants regardless of its merit.

## **2. Indemnification.**

ERS&E seeks indemnification from Defendants, Janice Richter and Jan Richter P.C. for "their intervening and superseding role in the causation of any damages to Hill." (Pl.'s Countercl. in Reply at ¶ 34.) Again, ERS&E asserts that Foy's ex parte contact with Judge Sweeney caused any injury suffered by Hill.

Under New Jersey law, the right to indemnification exists either by contract or as a matter of equity. New Milford Bd. of Educ. v. Juliano, 530 A.2d 43, 44 (N.J. Super. 1987). As an equitable remedy, indemnification provides relief to an innocent party who is held liable to another through no fault of their own. Pub. Serv. Elec. and Gas Co. v. Waldroup, 119 A.2d 172, 179 (N.J. Super 1955)(citing Builders Supply Co. v. McCabe, 77 A.2d 368, 370-71 (Pa.1951)). A party is not entitled to indemnification if they are primarily liable for damages. New Milford Bd. of Educ., 530 A.2d at 45. Only a party secondarily liable is entitled to indemnification. Id.

Defendants counterclaims seek to hold ERS&E primarily liable for injury to Hill. Primary liability is imposed for

active fault. Pub. Serv. Elec. and Gas Co., 119 A.2d at 179 (citing Builders Supply Co., 77 A.2d at 370-71). Secondary liability is imposed, not for active fault, but by reason of some legal obligation. Id. Nothing in the pleadings suggests that ERS&E's potential liability is merely constructive, secondary or vicarious. ERS&E, if liable at all, will be primarily liable, therefore, the indemnification counterclaim in reply asserted against Defendants must be dismissed.

### **3. Abuse of Process.**

ERS&E's abuse of process counterclaim in reply alleges that Hill, Janice Richter and Jan Richter P.C. have continued to prosecute their counterclaims knowing they were meritless and frivolous. (Pl.'s Countercls. in Reply at ¶ 42.) ERS&E claims that the deficient counterclaims were brought to delay this litigation, to financially injure ERS&E, and to divert funds from Hill to Irvin and Janice Richter. (Id. at ¶¶ 39-40.) These allegations, even if true, are insufficient to state a claim for abuse of process.

"The elements of the tort of abuse of process are (1) an ulterior motive and (2) some further act after an issuance of process representing the perversion of the legitimate use of the process." SBK Catalogue Partnership v. Orion Pictures, 723 F. Supp. 1053, 1067 (D.N.J. 1989). "Bad motives or malicious intent leading to the institution of a civil suit are insufficient to

support this cause of action." Id. "Regular and legitimate use of process, though with a bad intention, is not malicious abuse of process." First Fidelity Bancorp. v. First Fidelity Capital, 723 F. Supp. 246, 248 (D.N.J. 1989)(citing ADM Corp. v. Speedmaster Packaging Corp., 384 F. Supp. 1325, 1349 (D.N.J. 1974)).

Defendants counterclaims assert legitimate legal rights. ADM Corp., 384 F. Supp. at 1349. This cannot form the basis of an abuse of process claim even if an ulterior motive exists. Id. There is no evidence that Hill, Janice Richter or Jan Richter P.C. "used process in a manner not contemplated by law," therefore, the abuse of process counterclaim must be dismissed. SBK Catalogue Partnership, 723 F. Supp. at 1067.

B. The Motions to Dismiss ERS&E's Third-Party Complaint.

In its third-party complaint ERS&E seeks contribution and indemnification from the Hellring firm, FUB and UJB. The Hellring firm, appearing pro se, seeks dismissal for lack of personal jurisdiction pursuant to Federal Rule 12(b)(2) or, alternatively, for failure to state a claim upon which relief can be granted pursuant to Federal Rule 12(b)(6). FUB and UJB, represented by Klehr, Harrison, Harvey, Branzburg & Ellers LLP, have moved for dismissal for failure to state a claim upon which relief can be granted pursuant to Federal Rule 12(b)(6). Both motions are addressed below.

1.     **The Hellring Firm.**

a.     Personal Jurisdiction.

This Court is bound to apply the long arm statute of Pennsylvania in determining whether or not personal jurisdiction exists. FED. R. CIV. PRO. 4(e). Pennsylvania's long arm statute allows this Court to exercise personal jurisdiction to the limits of the due process clause of the Fourteenth Amendment. 42 Pa.C.S.A. § 5322(b). To comply with due process the exercise of personal jurisdiction must be based on sufficient minimum contacts with the forum state "such that the maintenance of suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). ERS&E contends that Hellring's contacts with Pennsylvania allow this Court to exercise "specific jurisdiction."

Specific jurisdiction is evoked when the cause of action arises directly from forum related activities constituting "minimum contacts." Surgical Laser Techs. v. C.R. Bard, Inc., 921 F. Supp. 281, 283 (E.D. Pa. 1996).<sup>3</sup> It is ERS&E's burden to prove that sufficient minimum contacts exist. Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 482 (3d Cir. 1993). Only contacts directly related to ERS&E's third-

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<sup>3</sup> "General jurisdiction" is evoked when the cause of action is unrelated to forum activities but the Defendant's contacts are "continuous and systematic." Surgical Laser Techs. v. C.R. Bard, Inc., 921 F. Supp. 281, 283 (E.D. Pa. 1996).

party claims are relevant to this inquiry. Surgical Laser Techs., 921 F. Supp. at 284. ERS&E's third-party claims seek indemnification and contribution for any damages Hill suffered as a result of the legal representation rendered in the New Jersey Action.

The issue presented is whether Hellring's activities within the state of Pennsylvania that directly relate to ERS&S's third-party claims rise to the level of "minimum contacts." The Hellring firm asserts that ERS&E has failed to sufficiently allege that it has sufficient minimum contacts with Pennsylvania. ERS&E argues that sufficient minimum contacts exist. Those contacts, as alleged by ERS&E, consist of (1) appearing as co-counsel with ERS&E, a Pennsylvania corporation, in the representation of Hill; (2) communicating with ERS&E in Pennsylvania by telephone, telecopier, mailings, and/or meetings relating to the representation of Hill; and (3) coordinating and directing the New Jersey action from FUB's Pennsylvania office. (Pl.'s Resp. to Third-party Def. Hellring's Mot. to Dismiss.)

Minimum contacts require a deliberate act of the defendant which evidences a purposeful availment of the "privilege of conducting activities within the forum state." Grand Entertainment Group, 988 F.2d at 482. Unfortunately, ERS&E overstates the contacts Hellring had with Pennsylvania. First, Hellring's role as co-counsel with ERS&E is not a contact with



Pennsylvania at all. The New Jersey Action was brought in New Jersey not Pennsylvania, and the Hellring firm never appeared in Pennsylvania on Hill's behalf. Likewise, the Banks' decision to direct and coordinate the New Jersey Action from their offices in Pennsylvania is not a Hellring contact with Pennsylvania. Hellring's contacts directly related to ERS&E's third-party claims are limited to "telephone, telecopier, mailings, and/or meetings" in Pennsylvania.<sup>4</sup>

Telephone calls, telecopier communications, and mailing across state lines "may count toward the minimum contacts that support jurisdiction." Grand Entertainment Group, 988 F.2d at 482. Additionally, Hellring's presence in Pennsylvania for an unspecified number of meetings also supports the exercise of personal jurisdiction. Carteret Sav. Bank, FA v. Shusan, 954 F.2d 141, 149 (3d. Cir. 1992)(telephone calls and mailings coupled with attendance at a meeting within the forum suffices to establish the minimum contacts necessary for specific jurisdiction). Despite these contacts, under the facts of this case, personal jurisdiction is lacking because none of these contacts were initiated by Hellring.

Hellring did not "purposefully avail[] itself of the privilege of conducting activities within the forum state."

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<sup>4</sup> ERS&E's use of the phrase "and/or meetings" is highly suspect, however, for purposes of this Motion I will assume that such meetings occurred.

Grand Entertainment Group, 988 F.2d at 483 (citing Hanson v. Denkla, 357 U.S. 235, 253 (1958); Time Share Vacation Club v. Atl. Resorts, Ltd., 735 F.2d 61, 65 (3d Cir. 1984)(same).

Rather, Hellring was forced to communicate with ERS&E because Hill retained both firms to represent them in the New Jersey Action. This is a case where "the non-forum resident was unilaterally drawn into the forum by another." Grand Entertainment Group, 988 F.2d at 484. For these reasons, this court lacks personal jurisdiction over the Hellring firm and ERS&E's third-party complaint against them must be dismissed.

b. Failure to state a claim.

Alternatively, ERS&E's third-party complaint must be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). ERS&E alleges that the Hellring firm played an "intervening and superseding role in the causation of any damage to Hill." (Pl.'s Third-party Compl. at ¶¶ 32, 35.) This allegation is insufficient to state a claim for contribution or indemnification, therefore, the third-party complaint must be dismissed.

As to ERS&E's contribution claim, as previously stated, joint tortfeasors are "two or more persons jointly or severally liable in tort for the same injury to person or property." N.J. STAT. ANN. 2A:53A-1. ERS&E's third-party complaint does not allege that Hellring is a joint tortfeasor. Rather, ERS&E

alleges that Hellring was the sole cause of any damage to Hill. New Milford Bd. of Educ., 530 A.2d at 45. If, as ERS&E alleges, Hellring played an "intervening and superseding role," this would break the causal connection between ERS&E's negligence and Hill's harm and render Hellring liable alone. Thus, ERS&E's contribution claim against Hellring must be dismissed.

ERS&E's indemnification claim must also be dismissed for failure to state a claim. Although a claim for indemnity by an initial tortfeasor against a successive tortfeasor is allowable, that is not what ERS&E has alleged. New Milford Bd. of Educ., 530 A.2d at 45. ERS&E does not seek to limit its liability, but seeks to escape liability entirely by shifting the blame Hellring. Id. As previously stated, indemnity is not available to a party who is primarily liable for an injury. Id. If liable at all, ERS&E will be primarily liable, therefore, the indemnification claim must be dismissed.

## **2. First Union Bank and United Jersey Bank.**

The Banks have moved for dismissal of ERS&E's Third-party Complaint for failure to state a claim upon which relief can be granted. ERS&E's third-party complaint seeks contribution and indemnification from the Banks. Again, ERS&E has failed to state a claim, therefore, the third-party complaint must be dismissed.

In its contribution claim, ERS&E alleges that FUB and

UJB "acted at their own risk and without privilege, justification and in a commercially unreasonable manner in claiming Hill was in default and directly contacting Hill customers to forward payment directly to FUB and UJB." (Pl.'s Third-party Compl. at ¶ 31.)

ERS&E claims the Banks actions played an "intervening and superseding role in the causation of any damage to Hill" and that this entitles them to contribution for "any and all damages." (Pl.'s Third-party Compl. at ¶¶ 32-33.)

The contribution claim must be dismissed because ERS&E has failed to allege that it is a joint tortfeasor with FUB and UJB for two reasons. First, joint tortfeasor's are "jointly and severally liable." N.J. STAT. ANN. 2A:53A-1. If, as ERS&E alleges, the Banks played an "intervening and superseding role" this would break the causal connection between ERS&E's negligence and Hill's harm and render the Banks liable alone. Second, Hill did not suffer the "same injury" as a result of ERS&E and the Banks conduct in the New Jersey Action. N.J. STAT. ANN. 2A:53A-1. Any injury Hill suffered when the Banks seized its accounts receivables is not the "same injury" Hill suffered if, as alleged, ERS&E provided Hill with faulty legal advice. Thus, ERS&E's contribution claim against the Banks must be dismissed for failure to allege joint tortfeasor status between the parties.

ERS&E's indemnification claim against the Banks must

also be dismissed. Indemnification is not available to a primarily liable party. New Milford Bd. of Educ., 530 A.2d at 45. ERS&E, if liable at all, will be primarily liable, therefore, the indemnification claims must be dismissed.

Accordingly, I will enter the following Order.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELLIOTT, REIHNER, SIEDZIKOWSKI	:	
& EGAN, P.C.,	:	CIVIL ACTION
Plaintiff,	:	
Third-party Plaintiff,	:	
Counterclaim Plaintiff	:	
	:	
v.	:	
	:	
DAVID RICHTER, IRVIN RICHTER,	:	
AND HILL INTERNATIONAL, INC.,	:	NO. 96-3860
Defendants,	:	
Counterclaim Defendants	:	
	:	
JANICE RICHTER, AND	:	
JAN RICHTER P.C.,	:	
Counterclaim Defendants	:	
	:	
FIRST UNION BANK, formerly FIRST	:	
FIDELITY BANK, UNITED JERSEY BANK,	:	
formerly UNITED JERSEY BANK SOUTH,	:	
HELLRING, LINDEMAN GOLDSTEIN &	:	
SIEGAL,	:	
Third-party Defendants.	:	
	:	

**ORDER**

AND NOW, this 21st day of August, 1998, upon consideration of the Motion to Dismiss Plaintiff's Counterclaims filed by Defendants David Richter, Irvin Richter, Hill International, Janice Richter, and Jan Richter P.C., and the Motions to Dismiss Plaintiff's Third-party Complaint filed by Defendants First Union Bank, United Jersey Bank, and Hellring Lindeman Goldstein & Siegal, it is hereby ORDERED that said Motions are GRANTED.

BY THE COURT:

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Robert F. Kelly, J.